RECENT ENGLISH DECISIONS.

High Court of Justice; Queen's Bench Division.

THE QUEEN v. PRICE.

To burn a dead body, instead of burying it, is not a misdemeanor, uuless it is so done as to amount to a public nuisance.

If an inquest ought to be held upon a dead body, it is a misdemeanor so to dispose of the body as to prevent the coroner from holding the inquest.

AT the assizes held at Cardiff before STEPHEN, J., in February 1884, William Price was indicted for trying to burn the body of his child, instead of burying it, and a second indictment charged him with attempting to burn the body with intent to prevent the holding of an inquest upon it.

G. B. Hughes, Q. C., and *B. T. Williams*, appeared for the prosecution.

The prisoner was undefended.

After hearing counsel for the prosecution the learned judge left the case to the jury, directing them in the terms of his charge to the grand jury, which on account of the importance and novelty of the subject to which it relates, is here given. The jury acquitted the prisoner on both charges.

STEPHEN, J.—One of the cases brought before you is so singular in its character, and involves a legal question of so much novelty and of such general interest, that I propose to state at some length what I believe to be the law upon the matter. I have given it all the consideration I could, and I am permitted to say that although I alone am responsible for what I am about to say to you, Lord Justice FRY takes the same view of the subject as I do, and for the same reasons.

William Price is charged with a misdemeanor under the following circumstances: He had in his house a child five months old of which he is said to have been the father. The child died and Price, as it seems, did not register its death. The coroner accordingly gave him notice on Saturday, the 12th of January 1884, that unless he sent a medical certificate of the cause of the child's death he (the coroner) would hold an inquest on the body on the following Monday. Price on the Monday afternoon took the body of the child to a field of his own, some distance from the town of Llantrissant,

put it into a ten gallon cask of petroleum and set the petroleum on fire. A crowd collected; the body of the child which was burning was covered with earth, and the flames were extinguished, and Price was brought before the magistrates and committed for trial. He will be indicted before you on a charge which in different forms imputes to him as criminal two parts of what he is said to have done. Namely, first, his having prevented the holding of an inquest on the body; and secondly, his having attempted to burn the child's body.

With respect to the prevention of the inquest, the law is that it is a misdemeanor to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one which ought to be held. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude, without adequate cause upon the privacy of a family in distress and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought to hold an inquest, and to prevent him from doing so by disposing of the body in any way—for an inquest must be held on the view of the body—is a misdemeanor. The depositions in the present case do not very clearly show why the coroner considered an inquest necessary. If you think that the conduct of Price was such as to give the coroner fair grounds for holding one, you ought to find a true bill, for beyond all question Price did as much as in him lay to dispose of the body in such a manner as to make an inquest impossible.

The other fact charged as criminal is the attempt made by Price to burn the child's body, and this raises, in a form which makes it my duty to direct you upon it, a question which has been several times discussed, and has attracted some public attention, though so far as I know no legal decision upon it has ever been given, the question, namely, whether it is misdemeanor at common law to burn a dead body instead of burying it.

As there is no direct authority upon this question I have found it necessary to examine several branches of the law which bear upon it more or less remotely. The practice of burning dead bodies

prevailed to a considerable extent under the Romans, as it does to this day amongst the Hindoos, though it is said that the practice of burial is both older and more general. Burning appears to have been discontinued in this country and in other parts of Europe when Christianity was fully established, as the destruction of the body by fire was considered, for reasons to which I need not refer here, to be opposed to Christian sentiment, but this change took place so long ago, and the substitution of burial for burning was so complete, that the burning of the dead has never been formally forbidden, or even mentioned or referred to, so far as I know, in any part of our law. The subject of burial was formally, and for many centuries exclusively, a branch of the ecclesiastical or canon law. Amongst the English writers on this subject, little is to be found relating to burial. The subject was much more elaborately and systematically studied in Roman Catholic countries than in England, because the law itself prevailed much more extensively. In the Jus Ecclesiasticum of Van Espen II. 142–168, Part II., sect. iv., tit. vii., there is an elaborate discourse filling twenty-two folio pages in double columns on the subject of burial, in which every branch of the subject is systematically arranged and discussed, with reference to numerous authorities. The importance of it is that it shows the view taken by the canonists, and this view had great influence on our own ecclesiastical lawyers, though only a very small part of the canon law itself was ever introduced into this country.

Van Espen throughout regards the participation in funeral rites as a privilege to which, subject to certain conditions, all the members of the church were entitled, and the deprivation of which was a kind of posthumous punishment analogous to the excommunication of the living. The great question with which he occupies himself is, in what cases ought burial to be denied? The general principle is, that those who are not worthy of church privileges in life are also to be excluded from them after death. ("*Sicuti enim nonnullos vivos a sua communione præsertim in sacris jam pridem excludendos censuit, ita quoque eosdem sue communione post mortem indignos credidit.*") As for the manner in which the dead bodies of persons deprived of Christian burial were to be disposed of, Van Espen says only that though in some instances the civil power may have entirely forbidden burial, whereby bodies may remain unburied and exposed to the sight of all to be devoured by

beasts or destroyed by the weather (he considers the dissection of criminals as a case of this sort), the church has never made such a provision, and has never prohibited the covering of such corpses with the earth.

This way of looking at the subject seems to explain how the law came to be silent on exceptional ways of disposing of dead bodies. The question was, In what cases burial must be refused? As for the way of disposing of bodies to which it was refused, the matter escaped attention, being probably regarded as a matter which interested those only who were so unfortunate as to have charge of such bodies.

The famous judgment of Lord STOWELL in the case of iron coffins (*Gilbert* v. *Buzzard*, 2 Hag. Con. Rep. 333), which constitutes an elaborate treatise on burial, proceeds upon the same principles. The law presumes that every one will wish that the bodies of those in whom he was interested in their lifetimes should have Christian burial. The possibility of a man's entertaining and acting upon a different view is not considered.

These considerations explain the reason why the law is silent as to the practice of burning the dead. Before I come to consider its legality directly it will be well to notice some analogous topics which throw light upon it. There is one practice which has an analogy to funeral burning, inasmuch as it constitutes an exceptional method of dealing with dead bodies. I refer to anatomy. Anatomy was practised in England at least as far back as the very beginning of the seventeenth century. It continued to be practiced without, so far as I know, any interference on the part of the legislature down to the year 1832, in which was passed the act for regulating schools of anatomy: 2 & 3 Wm. 4, c. 75. This act recites the importance of anatomy, and that "the legal supply of human bodies for such anatomical examination is insufficient fully to provide the means of such knowledge." It then makes provision for the supply of such bodies by enabling "any executor or other party having lawful possession of the body of any deceased person," to permit the body to be dissected, except in certain cases. The effect of this has been that the bodies of persons dying in various public institutions whose relations are unknown, are so dissected. The act establishes other regulations not material to the present question, and enacts that after examination the bodies shall be "decently interred." This act appears to me to prove clearly

that Parliament regarded anatomy as a legal practice, and further, that it considered that there was such a thing as "a legal supply of human bodies," though that supply was insufficient for the purpose. This is inconsistent with the opinion that it is an absolute duty on the part of persons in charge of dead bodies to bury them, and this conclusion is rather strengthened than otherwise by the provision in s. 13, that the "party removing" the body shall provide for its decent burial after examination. This seems to imply that apart from the act the obligation to bury would not exist, and it is remarkable that the words are not, as in the earlier section, "executor or other party," but "party removing," referring no doubt to the master of the workhouse or other person in a similar position who hands the body over to the surgeons. Upon him the statute imposes the duty of decently interring the bodies with which he is allowed to deal. The executor's rights at common law, whatever they may be, are not altered.

I come now to a series of cases more closely connected with the present case. As is well known the great demand for bodies for anatomical purposes not only led in some cases to murders, the object of which was to sell the body of the murdered person, but also to robberies of churchyards by what were commonly called resurrection men. This practice prevailed for a considerable length of time, as appears from the case of *Rex* v. *Lynn*, 2 T. R. 738, decided in 1788—forty-four years before the Anatomy Act. In that case it was held to be a misdemeanor to disinter a body for the purpose of dissection, the court saying that common decency required that the practice should be put a stop to, that the offence was cognisable in a criminal court as being "highly indecent and *contra bonos mores*, at the bare idea alone of which nature revolted." They also said that "it had been the regular practice of the Old Bailey in modern times to try charges of this nature." It is to be observed in reference to this case, that the act done would have been a peculiarly indecent theft if it had not been for the technical reason that a dead body is not the subject of property. The case, however, has been carried a step farther in modern times. It was held in *Reg.* v. *Sharpe*, 1 D. & B. 160, to be a misdemeanor to disinter a body at all without lawful authority, even when the motives of the offender were pious and laudable, the case being one in which a son disinterred his mother in order to bury her in his

father's grave, but he got access to the grave and permission to open it by a false pretence.

The law to be collected from these authorities seems to me to be this: The practice of anatomy is lawful and useful though it may involve an unusual means of disposing of dead bodies and though it certainly shocks the feelings of many persons, but to open a grave and disinter a dead body without authority is a misdemeanor, even if it is done for a laudable purpose.

These cases, for the reasons I have given, have some analogy to the case of burying a dead body, but they are remote from it. They certainly do not warrant the proposition that to burn a dead body is in itself a misdemeanor.

Two other cases come rather nearer to the point. They are *Reg* v. *Vann*, 2 Den. 325, and *Reg.* v. *Stewart*, 12 A. & E. 773, 779. Each of these cases lays down in unqualified terms that it is the duty of certain specified persons to bury in particular cases. The case of *Reg.* v. *Stewart*, *supra*, lays down the following principles: "Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial, and that implies the right to be carried from the place where his body lies to the parish cemetery." It adds, "the individual under whose roof a poor person dies is bound," (*i. e.*, if no one else is so bound, as appears from the rest of the case) "to carry the body decently covered to the place of burial. He cannot keep him unburied nor do anything which prevents Christian burial. He cannot, therefore, cast him out so as to expose the body to violation, or to offend the feelings or endanger the health of the living; for the same reason he cannot carry him uncovered to the grave." In the case of *Reg.* v. *Vann*, the court held: "That a man is bound to give Christian burial to his deceased child, if he has the means of doing so; but he is not liable to be indicted for a nuisance if he has not the means of providing burial for it."

These cases are the nearest approach which I have been able to find to an authority directly upon the present point. It may be said that if there is an absolute duty upon a man having the means to bury his child, and if it is a duty to give every corpse Christian burial, the duty must be violated by burning it. I do not think, however, that the cases really mean to lay down any such rule. The question of burning was not before the court in either case.

In *Reg.* v. *Stewart* the question was whether the duty of burial lay upon the parish officers or upon some other person. In *Reg.* v. *Vann* the question was whether a man who had not the means to bury his child was bound to incur a debt in order to do so. In neither case can the court have intended to express themselves with complete verbal accuracy, for in the case of *Reg.* v. *Stewart* the court speaks of the "rights" of a dead body, which is obviously a popular form of expression—a corpse not being capable of rights, and in both cases the expression "Christian burial" is used, which is obviously inapplicable to persons who are not Christians, Jews for instance, Mahommedans or Hindoos. To this I may add that the attention of neither court was called to the subject of anatomy already referred to. Skeletons and anatomical preparations could not be innocently obtained if the language of the cases referred to were construed as if it were intended to be severely and literally accurate.

There is only one other case to be mentioned. It is the case of *Williams* v. *Williams*, which was decided just two years ago by KAY, J., in the Chancery Division of the High Court, and is reported in the Law Reports, 20 Ch. D. 659, (21 Am. Law Reg. (N. S.) 508). In this case one H. Crookenden directed his friend, Eliza Williams, to burn his body, and directed his executors to pay her expenses. The executors buried the body. Miss Williams got leave from the Secretary of State to disinter it in order, as she said, to be buried elsewhere. Having obtained possession of it by this misrepresentation, she burnt it, and sued the executors for her expenses. The case leaves the question now before me undecided. "The purpose," said Judge KAY, "confessedly was to have the body burnt, and thereupon arises a very considerable question whether that is or is not a lawful purpose according to the law of this country. That is a question I am not going to decide." He held that in that particular case the removing of the body and its burning were both illegal according to the decision of *Reg.* v. *Sharpe*, 1 D. & B. 160, already referred to. "Giving the lady credit" he said, "for the best of motives, there can be no kind of doubt that the act of removing the body by that license and then burning it was as distinct a fraud on that license as anything could possibly be." This was enough for the purposes of the particular case, and the learned judge accordingly expressed

no opinion on the question on which it now becomes my duty to direct you.

The question arises in the present case in a perfectly clear and simple form, unembarrassed by any such consideration as applied to the other cases to which I have referred. There is no question here of the illegality and dishonesty which marked the conduct of those that were described as resurrection men, nor of the artifices, not indeed criminal, but certainly disingenuous, by which possession of the body was obtained in the cases of *Reg.* v. *Sharpe* and *Williams* v. *Williams*. Price had lawful possession of the child's body, and it was not only his right but his duty to dispose of it by burying, or in any other manner not in itself illegal. Hence I must consider the question whether to burn a dead body instead of burying it is in itself an illegal act.

After full consideration, I am of opinion that a person who burns instead of burying a dead body does not commit a criminal act, unless he does it in such a manner as to amount to a public nuisance at common law. My reason for this opinion is that upon the fullest examination of the authorities, I have, as the preceding review of them shows, been unable to discover any authority for the proposition that it is a misdemeanor to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one.

There are some instances no doubt in which courts of justice have declared acts to be misdemeanors, which had never previously been decided to be so, but I think it will be found that in every such case the act involved great public mischief or moral scandal. It is not my place to offer any opinion on the comparative merits of burning and burying corpses, but before I could hold that it must be a misdemeanor to burn a dead body I must be satisfied not only that some people, or even that many people object to the practice, but that it is on plain undeniable grounds, highly mischievous or grossly scandalous. Even then I should pause long before I held it to be a misdemeanor, for many acts involving the grossest indecency and grave public mischief—incest for instance, and, where there is no conspiracy, seduction or adultery—are not misdemeanors, but I cannot take even the first step. Sir Thomas Browne finishes his famous essay on Urn Burial with a quotation from Lucan, which in eight words seems to sum up the matter: "*Tabesne cadavera sol-*

vat an rogus haud refert." Whether decay or fire consumes corpses matters not. The difference between the two processes is only that one is quick, the other slow. Each is so horrible that every healthy imagination would turn away from its details; but one or the other is inevitable, and each may be concealed from observation by proper precautions. There are, no doubt, religious convictions and feelings connected with the subject which every one would wish to treat with respect and tenderness, and I suppose there is no doubt that as a matter of historical fact the disuse of burning bodies was due to the force of those sentiments. I do not think however that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanor at common law. The statement of such a proposition, in plain words, is a sufficient refutation of it, but nothing short of this will support the conclusion that to burn a dead body must be a misdemeanor. As to the public interest in the matter, burning, on the one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might, no doubt, destroy the evidence of crime. These however are matters for the legislature and not for me. It may be that it would be well for Parliament to regulate or forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law. This rule is no doubt subject to exceptions, but they are rare, narrow, and to be admitted with the greatest reluctance, and only upon the strongest reasons.

This brings me to the last observation I have to make. Though I think that to burn a dead body decently and inoffensively is not criminal, it is obvious that if it is done in such a manner as to be offensive to others it is a nuisance of an aggravated kind. A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all her Majesty's subjects. To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go, is beyond all doubt a nuisance, as nothing more offensive, both to sight and to smell can be imagined. The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been

done in such a situation and manner as to be offensive to any considerable number of persons you should find a true bill.

The question involved in this case has never before, so far as we can learn, been before an English or American court of justice for decision; and the importance of the subject as well as the interest and attention it is attracting, both in the medical profession and from the general public, is sufficient warrant for its presentation in this place. The case of *Williams* v. *Williams*, decided two years ago in the Chancery Division of the High Court of Justice, reported and annotated in 21 Am. Law Reg., N. S., 508, was a case which arose out of the cremation of the body of a testator, but the question here involved was not decided. The great learning of the judge who gave the charge in the principal case, as well as the fact that Lord Justice FRY concurred in this opinion, will invest it with great authority whenever the question shall again come up for decision, as it unquestionably will in the not far distant future. We have read the case carefully several times; and, while we confess that our personal opinion is very decidedly in favor of the cremation of dead bodies, under such statutory regulations as may be necessary to prevent the destruction of the evidence of crime, as soon as the state of public sentiment will warrant it, yet we consider the reasoning of the learned judge in support of his conclusion that cremation is not illegal very unsatisfactory; and we are of the opinion that the authorities referred to by him in his opinion support the conclusion that it is the duty of the executor or other person having charge of a dead body, except where a different disposition is authorized by statute, to bury it and not to burn it, and that such will continue to be his duty till public sentiment is so changed as to demand and procure legislation authorizing cremation, a consummation which in the more thickly settled communities at least, is most devoutly to be wished, and must eventually be attained.

Whether cremation is a misdemeanor or not, is another and different question; for it may be illegal and yet not be a criminal offence. If it is not illegal, it of course cannot be a crime. Perhaps on this branch of the case the opinion of the learned judge is not so open to criticism, for no one can say that cremation properly conducted is "on plain, undeniable grounds, highly mischievous, or grossly scandalous." To us it seems quite the contrary.

The American cases upon the subject of property in dead bodies, in many of which the subject of burial is incidentally considered, will be found collected in the note to *Williams* v. *Williams*, already referred to.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Kansas.

WILLIAM ORT *v.* MARY FOWLER.

Where a party in full possession of all his faculties and able to read, even though slowly and with difficulty, signs a negotiable and promissory note under the belief that it is an instrument of a different character, and does so without himself reading the instrument but relying on the reading and representations of a stranger, the execution of the note under these circumstances is such negligence on his part as will render him liable thereon to a *bona fide* holder.